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CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 900

THE DETROIT AND TOLEDO SHORE LINE RAILROAD COMPANY, *Petitioner*

v.

UNITED TRANSPORTATION UNION, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE RAILWAY LABOR EXECUTIVES' ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF THIS AMICUS CURIAE

The Railway Labor Executives' Association is an unincorporated association with which are affiliated twenty standard labor organizations that are the duly authorized and designated collective bargaining representatives under the Railway Labor Act of almost all

the country's railroad employees and many of its airline employees. The labor organizations affiliated with the Association are:

American Railway Supervisors' Association
American Train Dispatchers' Association
Brotherhood of Maintenance of Way Employes
Brotherhood of Railroad Signalmen
Brotherhood Railway Carmen of the United States and Canada
Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (into which on February 21, 1969 was merged Transportation - Communication Employees Union, formerly The Order of Railroad Telegraphers)
Transportation-Communication Division—Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
Brotherhood of Sleeping Car Porters
Hotel and Restaurant Employes & Bartenders' Int'l. Union
International Association of Machinists
International Brotherhood of Boilermakers and Blacksmiths
International Brotherhood of Electrical Workers
International Brotherhood of Firemen and Oilers
International Organization Masters, Mates and Pilots of America
National Marine Engineers' Beneficial Association
Railroad Yardmasters of America
Railway Employes' Department, AFL-CIO
Seafarers' Int'l. Union of North America
Sheet Metal Workers' International Association
United Transportation Union (a merger effective January 1, 1969 of the former Brotherhood of Locomotive Firemen and Enginemen, the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, and Switchmen's Union of North America)

This Court has repeatedly recognized Railway Labor Executives' Association as a proper party to appear and speak for its affiliated labor organizations and the railroad employees they represent in collective bargaining. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950); *American Trucking Associations* v. *United States*, 355 U.S. 141 (1957).

This case turns upon the construction and application of several provisions of the Railway Labor Act (45 U.S.C. §§ 151 et seq.), especially Section 2, First; Section 2, Second; Section 2, Seventh; Section 5(b); Section 6; and Section 10. These are the fundamental provisions of the Railway Labor Act governing the procedural requirements for changing rates of pay, rules, and working conditions of railroad and airline employees. The resolution of the questions presented are thus of fundamental importance to the Railway Labor Executives' Association, its affiliated unions, and the employees they represent. The petitioner in this case is a single union. The petitioner must direct its attention to the specific detailed facts presented in this case, while the Association can concentrate on the importance of the decision below to all railroad labor and to the conduct of orderly collective bargaining.

QUESTIONS PRESENTED

The questions presented do not include the Question Presented in Petitioner's petition. Rather they are the Question Presented in Respondents' Opposition and a variant of that Question:

May a carrier unilaterally change a condition of employment that is a subject of mandatory bargaining,

without bargaining with the union, regardless of whether there is a provision on the subject in the collective bargaining agreement, regardless of whether there is a section 6 notice on the subject outstanding, and regardless of whether the subject is in mediation,—so long only as the condition of employment is a subject on which bargaining can be required?

STATEMENT OF THE CASE

We agree with the statement of the case as stated in Respondents' brief. We state here only a few brief facts on which the emphasis of this brief is dependent.

The collective bargaining agreement here involved does not deal with where the employees involved shall report for duty or be released from duty. (A. 143) But "for many, many years" the practice that governed the carrier's operation was for the employees involved to report for duty and be released from duty at Lang Yard in Toledo, Ohio. (A. 146, 148, 158, 167)

In 1961 the Carrier announced its intention to require certain crews to report for duty and to be released from their tour of duty at Edison Station in Trenton, Michigan instead of Toledo. There was some fuss about this, including mediation and a proffer of arbitration by the National Mediation Board. (A. 148, par. 5) The proffer of arbitration was rejected by both sides, the Carrier in its rejection stating that it had abandoned its plan to change the on-and-off-duty points for those crews to Trenton. (A. 149, par. 8)

Trenton is about 35 miles north of Toledo. (A. 159, 161) (The record at various points refers to the distance as more than 30 miles, 33 miles, 35 miles, and 30-40 miles; for the purpose of this case the differences are not material, and we take the figure as 35 miles.)

As noted, the collective agreement had no provision concerning where on-and-off-duty points would be, although the practice "for many, many years" had been that it would be Toledo. (A. 146) On January 27, 1966, the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E"), one of the four operating unions that merged to form the Respondent United Transportation Union, served a notice under Section 6 of the Railway Labor Act that would add a provision that Lang Yard in Toledo would be, as was the long practice, the sole point for reporting on and off duty. Mediation by the National Mediation Board was invoked and was pending when this action was commenced on September 23, 1966. (A. 149, par. 9; 158) In the meantime the Carrier, on May 26 and September 19, 1966, after the BLF&E Section 6 notice, announced that certain crews would have their on-and-off-duty points changed from Toledo to Trenton. (A. 111, 120, 150 par. 10, 158)

This action was commenced by the Carrier to enjoin BLF&E from striking over those announcements. The Union counterclaimed to enjoin the Carrier from carrying out those announcements while the Section 6 notice and mediation were pending, in accordance with the *status quo* provisions of Sections 5 and 6 of the Railway Labor Act. The Carrier's request for an injunction against the Union was denied, and the Union's request for an injunction pending the disposition of the Section 6 notice and mediation was granted. (There was thus no strike because the Shore Line's threatened conduct that would have been the subject of the strike was enjoined.) The Courts below held that where a man reports for work and is released is a major condition of employment (A. 145); that changing the on-and-off point by 35 miles would be a change in

working conditions and established practices (A. 152, par. 8); and that unilaterally changing the on-and-off-duty point by 35 miles while a Section 6 notice on the subject was pending in mediation by the National Mediation Board would be a violation of the *status quo* provisions of Sections 5 and 6 of the Railway Labor Act. (A. 159)

Until it filed its Petition in this Court for a writ of certiorari, the Carrier took the position that BLF&E's Section 6 notice, establishing by agreement the on-and-off-duty point (instead of the theretofore undeviated practice) was not a subject of mandatory bargaining but was a matter of management prerogative. The District Court held than an on-and-off-duty point was a subject of mandatory bargaining because it was a "working condition" as that term is used in the Railway Labor Act (A. 161), and the Court of Appeals affirmed. (A. 168-69) In its Petition in this Court for the writ the Carrier does not state that issue as one of the Questions Presented nor does it make such argument in its brief, and we assume the Carrier is no longer making that contention.

SUMMARY OF ARGUMENT

1. The subject of on-and-off-duty point is a subject of mandatory bargaining. Here, for "many, many years" that point had been Lang Yard, Toledo. The Carrier's threat to move that point 35 miles to Trenton, without negotiation, if carried out, would have been in contravention of its bargaining duty under the Act even though there was no provision in the collective agreement on the subject, for no change may be made in "working conditions" without bargaining. This is the express holding of *Fibreboard Paper Products*

Corp. v. *N.L.R.B.*, 379 U.S. 203 (1966), which is equally applicable to labor relations under the Railway Labor Act as under the National Labor Relations Act.

2. The Carrier's threat to move the on-and-off-duty point at a time when a Section 6 notice on that subject was outstanding and in mediation would have violated the *status quo* provisions of the Railway Labor Act applicable to "major" disputes. Such change may be made only after exhausting the Act's procedures applicable to such disputes although there was no provision in the collective bargaining agreement on the subject. The *status quo* provisions of Sections 5 and 6 of the Railway Labor Act apply regardless of whether the working condition is "embodied in an agreement". Only Section 2, Seventh, unlike Sections 5 and 6, prohibits a change in working conditions "embodied in agreements". Thus a violation of the *status quo* provisions of Sections 5, 6, or 10 is only a civil wrong and may be enjoined or some other appropriate remedy afforded, but if a carrier goes so far as to make a change in a working condition "embodied in an agreement" in violation of Section 2, Seventh, then Section 2, Tenth makes it a criminal wrong punishable by fine or imprisonment or both and each day of such offense is a separate offense.

ARGUMENT

I. A CARRIER MAY NOT MAKE A UNILATERAL CHANGE IN RATES OF PAY, RULES, OR WORKING CONDITIONS WITHOUT FIRST HAVING EXHAUSTED THE APPLICABLE PROCEDURES OF THE RAILWAY LABOR ACT WHETHER OR NOT THERE IS IN EXISTENCE AN AGREEMENT RELATING TO THE SUBJECT MATTER OF THE CHANGE.

The District Court sustained BLF&E's counterclaim and enjoined the Carrier from establishing a new on-and-off-duty point at Trenton or any other point not previously established until the pending major dispute

in National Mediation Board Case No. A-7839 should be handled to a conclusion and the right to resort to self-help matured by completing the procedures of Sections 5 and 6 of the Railway Labor Act or earlier if agreement on the dispute should be reached. (A. 153-54)

The Carrier asserts that a Special Board of Adjustment decided that the Carrier had the right claimed. All that Board decided (with respect to another assignment) was that there was no provision in the *agreement* precluding the establishment of an outlying assignment. (A. 110) It did not determine the Carrier's rights or obligations under the Railway Labor Act in this regard; such question was not raised and probably would have been beyond its jurisdiction.

The Shore Line contends that in the absence of a written agreement on the subject, a carrier subject to the Railway Labor Act is at liberty, as a matter of management prerogative, to make unilateral changes in the rates of pay, rules, and working conditions of its employees unfettered by any provision of that Act dealing with procedures to be utilized when one of the parties desires to change rates of pay, rules, or working conditions. In other words, it contends that any condition of employment not previously included in an agreement is a matter of management prerogative and may be changed unilaterally by the Carrier, without bargaining, regardless of how long the condition of employment had been in effect.

Initially, it is no longer disputed, nor can it reasonably be disputed, that the on-and-off duty point is a "working condition" as that term is used in the Railway Labor Act, and that a 35 mile change in that point is a change in a "working condition". The

undisputed facts show that, with respect to the on-and-off-duty point of the crews here involved, that point had been in Toledo for many, many years.

One of the issues raised by the Brotherhood's Counterclaim, therefor, is whether the Carrier had the unilateral right, as a matter of management prerogative, to change a condition of employment long in existence, without bargaining. We submit that the Carrier did not have that right regardless of whether the factual situation in existence at the time the unilateral change in the working condition is contemplated is the result of an agreement or simply a practice that undeniably has been in existence for many, many years with respect to the crews here involved. The Carrier contends that management prerogative, even where a condition of employment is concerned, is curtailed only by agreement. In so contending, however, the Shore Line disregards fundamental principles established by the Railway Labor Act, a decision of this Court, and decisions of several Courts of Appeals.

The Railway Labor Act does not encourage unilateral action. On the contrary its purposes, as stated in Section 2 (45 USC, § 151a) are: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein . . . . (4) to provide for the prompt and orderly settlement of *all* disputes concerning rates of pay, rules, or working conditions; . . ." (Emphasis added)

Indeed, the first duties placed upon all parties to the Railway Labor Act are to:

> "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle *all disputes, whether arising out of the application of such*

agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof." (45 U.S.C., § 152, First).

"All disputes . . . shall be considered, and, if possible, decided, with all expedition, in conference . . ." (45 U.S.C., § 152, Second). (Emphasis added)

If the duty imposed by Sections 2, First and 2, Second upon both parties to make every reasonable effort to make agreements concerning working conditions is to be given effect then unilateral changes by the carrier in the conditions as they exist in fact must be prohibited until the procedures of the Railway Labor Act, designed for effecting the settlement of disputes by agreements rather than by force, are exhausted.

This Court has recognized the deleterious effect upon labor relations of an employer making unilateral changes in working conditions of employees without bargaining even in the absence of prior agreement concerning the subject matter, and has held such action to be unlawful as a violation of the duty to bargain concerning working conditions.

In *Fibreboard Paper Products Corp* v. *N.L.R.B.,* 379 U.S. 203 (1964), this Court held that it was a violation of the bargaining obligations of the National Labor Relations Act (29 U.S.C., §§ 151-168) for an employer to make a change in "conditions of employment" without first bargaining about the change even though the condition being changed was not included in the collective bargaining agreement. In that case the employer "contracted out" to an independent contractor its maintenance work. The Court held that

"contracting out" was a subject of mandatory bargaining and that the N.L.R.B. therefore properly found that the employer had unlawfully refused to bargain and properly ordered reinstatement and back pay even though the collective agreement had no provision concerning "contracting out".

Thus, a change in one of the "working conditions" concerning which an employer may be required to bargain may not be made without first bargaining about it even though the condition has not theretofore been the subject of bargaining or agreement and, until there has been bargaining, the *status* of the condition as it existed in fact at the time of the contemplated unilateral change must be maintained.

Several Courts of Appeals have held to the same effect,—that a practice which is a condition of employment and so a subject of mandatory bargaining may not be changed without bargaining even though it has not been bargained previously and is not in an agreement.

In *N.L.R.B.* v. *Central Illinois Public Service Co.*, 324 F. 2d 916 (7th Cir. 1963), the employer gave its employees a discount on the gas they used, without any agreement for such discount, and then discontinued doing so without negotiating about it. The Court of Appeals for the Seventh Circuit affirmed the decision of the N.L.R.B. that such unilateral change was a violation of the duty to bargain and affirmed the Board's order directing the employer to reimburse employees for a period during which the discount had been discontinued. The Court stated (324 F. 2d at 918):

> "In this case, the employees had selected a union as their collective bargaining representative . . . Respondent unilaterally discontinued its gas dis-

> count to a specified class of employees without affording the bargaining representative an opportunity to discuss and negotiate concerning the change . . . A finding of bad faith is not a prerequisite in such a situation."

Decision of Courts in other circuits are to the same effect. *General Telephone Co.* v. *N. L. R. B.*, 337 F. 2d 452 (5th Cir. 1964) (an employer which had paid a Christmas bonus for 35 years without discussing it with the union was held to have violated its bargaining duty when it unilaterally discontinued the bonus); *N. L. R. B.* v. *Lehigh Portland Cement Co.*, 205 F. 2d 832 (4th Cir. 1953) (an employer which rented property to employees was required to negotiate with the union a change in the amount of the rentals even though the subject had never been discussed during all the period of the union's representation); *N. L. R. B.* v. *Niles-Bement-Pond,* 199 F. 2d 713 (2d Cir. 1952) (employer's unilateral discontinuance of Christmas bonus held to be unlawful refusal to bargain notwithstanding absence of prior agreement on the subject). We know of no court that has held to the contrary.

The Court of Appeals for the Fifth Circuit recently decided a case under the Railway Labor Act very much like this Court's decision in *Fibreboard. Seafarers Union* v. *Galveston Wharves,* 351 F. 2d 183 (1965), 368 F. 2d 412 (1966), 400 F. 2d 320 (1968), cert. den. May 19, 1969 (37 U.S. Law Week 3440). In that case a "carrier" subject to the Railway Labor Act operated a grain elevator and was subject to that Act for all its employees.* The collective bargaining agreement had

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* A grain elevator is subject to the Railway Labor Act if it is operated by a railroad or by a company owned or controlled by a railroad and performing a service in connection with railroad transportation. 45 U.S.C. § 151, First.

no provision concerning contracting out or leasing a facility to a non-carrier. The carrier leased the elevator to a non-carrier but the lease had not yet become effective. The union served a Section 6 notice to include in the contract provisions concerning leasing or subcontracting. The carrier responded by stating that there was nothing to negotiate on that subject concerning the grain elevator because it had leased it and was no longer operating it. The Court of Appeals three times ruled that whether an employee would be working or not working (as in *Fibreboard*) was a working condition and that the carrier could not lawfully lease the facility, thus depriving the men of employment, without first bargaining with the union, that the carrier was required to bargain with the union concerning the leasing of the elevator even though the lease had gone into effect, and that since the carrier had effected the lease unlawfully without first bargaining with the union an appropriate remedy would be to require the carrier to pay the unemployed men the wages the men would have earned until the Section 6 notice should be disposed of. The Court said (351 F. 2d at 188-89):

> "... a carrier in imposing changes in nowise contemplated or arguably covered by the agreement is not to escape the impact of the Act merely through the device of unilateral action. ..."

The Court said further (351 F. 2d at 190):

> "The § 6 notice was appropriate and was in no sense a verbal formalism confected to give the appearance of a legal right not available. (see note 25, supra) Whether the union would be able to obtain any relief, whether its economic power *vis-a-vis* the Carrier would or would not result in any advantage, the Union through the § 6 notice had the clear right to demand that the Carrier

> comply with the emphatic demand of § 2 First and Second (see note 14, supra). As the announced action most assuredly was a change in "working conditions", the fact that the Union's § 6 notice came after the event is of no moment."

On the second appeal in that case, concerning the appropriate remedy, the Court said (368 F. 2d 413):

> "While we did not foreclose the possibility that the lease might have to be unscrambled—a literal restoration of the status quo—we felt that something less could be substituted, so long as the employees were substantially in the same position as if Galveston Wharves had complied with the Act."

The import of the above-cited provisions of the Railway Labor Act, the *Fibreboard* case, and the Circuit Court cases to the issue here is clear. If it be established that a particular condition of employment has been in effect for a reasonable length of time, an employer may not unilaterally change it without first bargaining, notwithstanding the fact that the existing situation was not the result of agreement between the parties. The existence of the factual situation coupled with the fact that the matter involved constitutes a subject of mandatory bargaining are sufficient to require the employer to bargain prior to effectuating any change.

The Shore Line cites *Manning* v. *American Airlines,* 329 F. 2d 32 (2d Cir. 1964) c. d., 379 U.S. 817 and *Bhd. of R. Trainmen* v. *Akron & Barberton Belt R. Co.,* 385 F. 2d 581 (D.C. Cir. 1967) c. d., 390 U.S. 923, but it misses the significance of those cases to the situation here presented. Both those cases hold that under the Railway Labor Act a working condition in effect on any day remains in effect, regardless of what the

collective agreement says about it, until changed in accordance with the procedures of the Act. In the *Manning* case the Court referred to

> ". . . the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation or arbitration . . . ." 329 F. 2d at 34.

And in *Akron & Barberton Belt* the Court said (385 F. 2d at 593):

> "The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification —subject to change only in accordance with the procedures prescribed by the Act."

It would be virtually impossible to include all "working conditions" in a collective bargaining agreement. Where a particular condition is satisfactory or tolerable to both sides, it is often omitted from the agreement. Suppose, for example, a collective agreement covering many subjects,—hours of work, vacations, holidays, sick leave, hospital insurance, and many other subjects,—but not rates of pay. Hardly anyone would argue that in such situation a carrier would have the right to reduce rates of pay unilaterally or that such action without bargaining would not be a violation of the duty to bargain under the Railway Labor Act concerning "rates of pay, rules, and working conditions". The situation is no different with respect to the working condition of the on-and-off-duty point.

Here, since the undisputed facts show that the on-and-off-duty point for many, many years was in Toledo and not 35 miles away, and since it is no longer challenged that such situation is a subject of mandatory bargaining under the Railway Labor Act, it follows that the Shore Line could not lawfully unilaterally change that *status* without following the bargaining provisions of the Railway Labor Act.

II. A CARRIER MAY NOT MAKE A UNILATERAL CHANGE IN RATES OF PAY, RULES, OR WORKING CONDITIONS DURING THE PENDENCY OF A SECTION 6 NOTICE COVERING THE SUBJECT OF THE CHANGE BECAUSE OF THE STATUS QUO PROVISIONS OF THE RAILWAY LABOR ACT.

In our earlier argument we showed that in the face of the long-established practice, constituting a condition of employment, the Carrier did not have the prerogative to change, unilaterally, by 35 miles, the on-and-off-duty point without first utilizing the procedures of the Railway Labor Act even in the absence of an agreement limiting such right, and that it follows that the *status quo* must be maintained in the interim whether or not a Section 6 notice is outstanding. We now show that where a Section 6 notice on a working condition is outstanding, a unilateral change in such condition is doubly unlawful because of the *status quo* provisions of the Railway Labor Act.

The District Court was correct in requiring the Shore Line to maintain the *status quo* that was in effect on January 27, 1966. On that date, the Brotherhood served a notice pursuant to Section 6 of the Railway Labor Act to include in the collective bargaining agreement the long practice of Toledo being the on-and-off-duty point. At the present time, the dispute engendered by that notice is in mediation before the National Mediation Board.

Under the *status quo* provisions of the Railway Labor Act, when a dispute has become the subject of a Section 6 notice, neither side may take any unilateral action with regard to the subject of the notice until the procedures of the Railway Labor Act have been invoked and exhausted regardless of whether the subject is already included in an agreement.

The Railway Labor Act contains four *status quo* provisions with respect to disputes which arise when one of the parties seeks to make a change in rates of pay, rules, or working conditions. It should be noted at the outset that the "collective bargaining agreement," as it is known in the railroad industry, consists of a series of separate agreements, made at different times, relating to various subjects, and that a "change" in it is accomplished no less by adding an agreement relating to a theretofore omitted subject than by modifying or cancelling one of the existing agreements (A. 86).

The first *status quo* provision is found in Section 2, Seventh of the Act (45 U.S.C., § 152, Seventh). It provides:

> "No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 [156] of this title."

A violation of this provision—changing a working condition embodied in an agreement without following the procedures of Section 6,—is a crime punishable by imprisonment or fine or both. Section 2, Tenth (45 U.S.C., § 152, Tenth).

Section 2, Seventh, however, does not deal with the procedure for accomplishing changes in rates of pay,

rules, or working conditions nor with the rights and obligations of the parties during the process of accomplishing a change. It merely makes criminally unlawful a change by a carrier in working conditions which are embodied in agreements without complying with the provisions of Section 6.

It is clear from the *status quo* provisions of Section 6, hereinafter quoted, and from other sections of the Railway Labor Act, that the *status quo* which is required to be maintained after the Section 6 notice is served is not limited to the *status quo* as expressed in a written agreement.

The *status quo* which the Railway Labor Act requires to be maintained while a dispute arising from a Section 6 notice is going through the processes of conference, mediation, and possible consideration by a Presidential Emergency Board or an arbitration board are those rates of pay, rules, and working conditions which exist in fact at the time the Section 6 notice is served.

The *status quo* provision of Section 6 of the Railway Labor Act, which is applicable from the time the notice is served and while conferences are being held with reference thereto and after the services of the Mediation Board have been requested by either party or after the Mediation Board has proffered its services, is that:

> ". . . rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this title, by the Mediation Board."

The *status quo* provision of Section 5 First (b) of the Railway Labor Act (45 U.S.C., § 155, First (b)),

like the *status quo* provision of Section 6, is expressed in the disjunctive. It provides:

> "... no change shall be made in the rates of pay, rules, or working conditions *or established practives* in effect prior to the time the dispute arose" (Emphasis supplied).

This provision, like Section 6, is not limited to changes in rates of pay, rules, or working conditions in effect as the result of an agreement. It specifically extends the *status quo* requirement to "established practices" regardless of how the practice came about.

The *status quo* provision of Section 10 of the Railway Labor Act (45 U.S.C., § 160) (consideration of a dispute by a Presidential Emergency Board) is that:

> "... no change, except by agreement, shall be made by the parties to the controversy *in the conditions out of which the dispute arose.*" (Emphasis supplied.)

The *status quo* required by Section 10 is the "conditions out of which the dispute arose"—not to only those "conditions" which are the result of agreement.

Sections 5, 6, and 10 of the Act are concerned with the same "dispute" or "controversy", i.e., the "dispute" or "controversy" which arises from an intended change in rates of pay, rules, or working conditions, and there can be no question that while the procedures of Section 6 for conference and of Section 5 for mediation are being pursued there may not be a lawful resort to self-help by either of the parties to such a dispute.

To exclude "established practices" or "the conditions out of which the dispute arose" from the *status quo* provisions of the Act, or to limit the applicability of the *status quo* provisions only to those "rates of

pay, rules, or working conditions" which are in effect as the result of agreement, would be to ignore the *status quo* provisions of Sections 5, 6, and 10 and to deny them their obvious meaning and intended effect. It would also *pro tanto* repeal the obligations imposed by Section 2 First and Second to make every reasonable effort to settle all disputes by negotiation and to make and maintain agreements.

Recognizing that to permit a union to resort to self-help and use its economic strength in the form of a strike to enforce the settlement of disputes which are pending before the National Railroad Adjustment Board would frustrate the jurisdiction of the National Railroad Adjustment Board, this Court held in *Bhd. of Railroad Trainmen* v. *Chicago River & I.R.R.*, 353 U.S. 30 (1957), that an anti-strike injunction in such cases is not precluded by the Norris-LaGuardia Act because such a strike would defeat the jurisdiction of the Adjustment Board over such minor disputes.

Similarly, if one party to a "major" dispute which arises under Section 6 of the Railway Labor Act could resort to self-help and take unilateral action with respect to the dispute while it is the subject of conferences required by Section 6 or while it is pending within the jurisdiction of the National Mediation Board as provided by Sections 5 and 6, such action would frustrate the purposes of the Railway Labor Act and of the conferences and mediation required by it. If the jurisdiction and mediatory function of the National Mediation Board are to be preserved and made effective, unilateral changes by the carrier in the conditions as they exist in fact must be prohibited until the procedures of the Railway Labor Act, designed for effecting the settlement of disputes by agreements rather than by the use of economic force, are exhausted.

The District Court in this case rejected the Carrier's approach. It stated (A. 162):

> "The general scheme of the statute indicates that the purpose of the status quo provision is to aid the National Mediation Board in its function of helping the parties to reach an agreement. If the carrier can unilaterally change the working conditions of its employees while such conditions are the subject of mediation efforts by the Board, the work of the Board would be greatly hampered. Thus, it would appear that whenever the services of the Board have been invoked, its jurisdiction should be protected by the application of the provisions of section 6 even if the particular condition is not fixed by the existing agreement. There is no reason why the status quo provisions should not apply whenever the Board is mediating a dispute."

See also *Spokane, Portland and Seattle R.* v. *Order of Railway Conductors and Brakemen,* 265 F. Supp. 892, 893-94 (D.D.C. 1967).

Another case in point is *Chicago and Western Indiana R.R. et al.* v. *Bhd. of Ry. Clerks et al.*, 231 F. Supp. 561 (N.D. Ill., 1963) *unappealed.* In that case two carriers maintaining joint offices decided to have separate facilities. They transferred employees from the joint offices to their newly formed separate offices without bargaining with the union. The collective bargaining agreements of the carriers and the union had no provision to cover the situation. Each of the parties had served Section 6 notices covering the matter, however, and the disputes were pending in mediation at the time the unilateral transfers were made. Judge Perry of the District Court entered a mandatory injunction requiring the carrier to restore the *status quo* on the ground that the Section 6 notices had given rise to a "major" dispute and no changes in the *status quo*

could be made until the procedures of the Act had been exhausted.

The Carrier argues that the *status quo* provisions of Sections 5 and 6 are limited to those working conditions referred to in Section 2, Seventh, i.e., those embodied in agreements. If that is so, then Section 2, Seventh would be entirely superfluous and it would have been pointless for Congress to have added it to the Act in 1934. As we have seen above, Section 2, Seventh does serve the purpose of making a unilateral change in a working condition embodied in an agreement a crime while a violation of the *status quo* provisions of Sections 5, First, (b), Section 6, and Section 10 are only civil wrongs.

The Carrier argues also that the *status quo* provision of Section 5 had no application to the present situation because its provision applies for a specified period *after* mediation is concluded and the present dispute is still in mediation.

Such argument highlights the fallacy of the Carrier's attempt to have this Court read Section 6 other than literally. Under such argument it would be unlawful for a carrier to make a unilateral change in a working condition for a time after mediation is concluded but not while mediation by the National Mediation Board is pending. Such foolishness should not lightly be attributed to Congress and surely should not be attributed when to do so requires a distortion of the plain meaning of the literal words of the statute. Plainly, Section 6 prohibits a unilateral change while direct negotiations on a Section 6 notice are going on and while the Mediation Board has jurisdiction, while Section 5, First, (b) maintains the *status quo* for thirty days thereafter both to provide a cooling off period and to give the

President an opportunity to decide whether to invoke Section 10 (the Presidential Emergency Board provision).

Thus, giving the *status quo* provisions of Sections 5 and 6 their plain, natural meaning makes a harmonious integrated whole of Section 2, Seventh, Section 5, Section 6, and Section 10, each serving its own purpose, while reading them as the Carrier would have us do, departing from their plain literal meaning, results in a hopeless hodgepodge.

Since the Shore Line's threatened conduct would constitute a violation of both express commands and requirements of the Railway Labor Act, it was properly enjoined. *Virginian Ry.* v. *System Federation,* 300 U.S. 515 (1937); *Brotherhood of Railroad Trainmen* v. *Chicago River and I. R. Co.,* 353 U.S. 30 (19[illegible]).

CONCLUSION

The Courts below reached their conclusion on the basis of Section 5 and Section 6 of the Railway Labor Act. They could also have reached that conclusion on the basis of Section 2, First, Section 2, Second, and the *Fibreboard* doctrine. The decision below should be affirmed.

Respectfully submitted,

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